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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE RODGERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether intentionally false, volunteered statements made to federal law enforcement officers are "within the jurisdiction of any department or agency of the United States," within the meaning of 18 U.S.C. 1001.

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v.

LARRY WAYNE RODGERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 706 F.2d 854. The order of the district court dismissing the indictment (App., *infra*, 5a-6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983 (App., *infra*, 7a). A petition for rehearing was denied on July 25, 1983 (App., *infra*, 8a). On September 14, 1983, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including October 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On September 2, 1982, a grand jury sitting in the Western District of Missouri returned a two-count indictment charging respondent with making false, fictitious and fraudulent statements and representations to the Federal Bureau of Investigation and the United States Secret Service, in violation of 18 U.S.C. 1001. Respondent moved to dismiss the indictment for failure to state an offense, and the district court granted his motion. App., *infra*, 5a-6a. The court of appeals affirmed. App., *infra*, 1a-4a.

1. The facts, as set forth in the court of appeals' opinion (App., *infra*, 2a), show that respondent telephoned the Kansas City, Missouri, office of the FBI on June 2, 1982, and reported that his wife had been kidnapped. The FBI spent more than 100 agent-hours investigating the alleged kidnapping; as a result, it determined that no kidnapping had occurred and that respondent's wife had left him voluntarily.

On June 15, 1982, respondent contacted the Kansas City office of the Secret Service and reported that his "estranged girlfriend" (actually his wife) had joined in a plot to assassinate the President. The Secret Service spent more than 150 hours of agent and clerical time investigating this threat and eventually located respon-

dent's wife in Arizona. She stated that she had left the Kansas City area in order to get away from respondent. Respondent subsequently confessed that he had made these false reports in order to induce the federal agencies to locate his wife.

2. The district court granted respondent's motion to dismiss the indictment, relying on the Eighth Circuit's holding in *Friedman* v. *United States*, 374 F.2d 363 (1967), that the investigation of a possible criminal violation is not a matter over which the FBI exercises "jurisdiction" in the sense that the term is used in 18 U.S.C. 1001. App., *infra*, 5a-6a.

The court of appeals affirmed, adhering to its reasoning in *Friedman* and finding that the same analysis applies to statements made to the Secret Service (App., *infra*, 3a). The court acknowledged that two other courts of appeals had reached a contrary conclusion on similar facts (*ibid.*), but it found its own prior analysis and reasoning "more persuasive" (*id.* at 3a-4a).

REASONS FOR GRANTING THE PETITION

This case presents a recurring and significant question concerning the scope of the federal false statement statute, 18 U.S.C. 1001. Section 1001 makes it a crime "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [to] * * * make[] any false, fictitious or fraudulent statements." The statute's proscription is clearly worded and is written in broad, sweeping terms. This Court has held on several occasions that the phrase "within the jurisdiction of any department or agency of the United States" should be accorded precisely the expansive construction that its language suggests. Notwithstanding the statute's unambiguous language and this Court's consistent liberal interpretation of it, however, the court of appeals here reaffirmed its holding in *Friedman* that "jurisdiction" in Section 1001 should not be given its literal meaning. The court of appeals per-

sisted in its view that "jurisdiction" refers only to an adjudicatory or regulatory power, and does not include the investigative authority of law enforcement agencies. In so holding, the Eighth Circuit placed itself squarely in conflict with the two other courts of appeals that have considered this issue. As a result, the volunteering of false information to law enforcement officers is subject to prosecution in some jurisdictions, while the same conduct escapes criminal sanction entirely in another. Moreover, if permitted to stand, the decision below will allow the willful perversion and disruption of official, authorized investigative functions of the FBI and the Secret Service, even though it was just such interference with the "authorized functions" of government that Section 1001 was designed to prohibit. *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941).

1. In *Friedman* v. *United States*, 374 F.2d 363 (1967), a divided panel of the Eighth Circuit held that a conviction under 18 U.S.C. 1001 could not be predicated on the defendant's false and volunteered complaint to the FBI of alleged mistreatment by state police officers, which the defendant claimed violated his civil rights. It based this ruling on the conclusion (374 F.2d at 365-366) "that the 'jurisdiction' of the F.B.I. to investigate crimes against the United States is not the 'jurisdiction' envisioned by § 1001."

Although the *Friedman* court acknowledged (374 F.2d at 366-367) that the application of 18 U.S.C. 1001 to the facts before it would be consistent with the literal language of the statute, it held that such an application would not comport with the "context * * * envisioned by the drafters" (*id.* at 366). The court relied heavily on the fact that the critical language—"in any matter within the jurisdiction of any department or agency of the United States"—was inserted in 1934, as "the government, at an accelerated pace, began entering the field of economic reform and regulation"

(*ibid.*). According to the court of appeals (*ibid.*), "the immediate and primary purpose in amending the * * * statute was to curtail the flow of false information to the newly created regulative agencies." Reasoning from that premise the court concluded (*ibid.*):

> Though the statute was drafted in broad inclusive terms, presumably due to the numerous agencies and the wide variety of information needed, there is nothing to indicate that Congress intended this statute to have application substantially beyond the purposes for which it was created.

The court implemented its conclusion by distinguishing (*id.* at 367) between the power "to make monetary awards, grant governmental privileges, or promulgate binding administrative and regulative determinations," and "the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action." According to the Eighth Circuit (*id.* at 368), Congress used the word "jurisdiction" in Section 1001 in only the former, more restrictive sense.

The court of appeals bolstered its decision by referring to 18 U.S.C. 1621, which prescribes a lesser maximum penalty than does Section 1001, and observing that Congress could not have "considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before a court of law." 374 F.2d at 366 & n.1. The court further opined (*id.* at 367) that "a literal application of the statute would completely remove the necessity for taking oaths." Finally, the court apparently was strongly influenced by its fear that adoption of the government's position would inhibit citizens from reporting suspected crimes to the police. *Id.* at 369.

Only four months after the Eighth Circuit rendered its opinion in *Friedman*, the Second Circuit rejected both the reasoning and the conclusion of that decision. In *United States* v. *Adler*, 380 F.2d 917, cert. denied,

389 U.S. 1006 (1967), the Second Circuit held that the president of a construction company violated 18 U.S.C. 1001 when, on his own initiative, he went to the local office of the FBI and told an agent there that he had been forced to pay bribes to government officials in the course of completing a construction contract at a government installation. Expressly rejecting the *Friedman* court's restrictive construction of the word "jurisdiction," the Second Circuit held (380 F.2d at 922) that the term "as used in the statute must mean simply the power to act upon information when it is received."

In so concluding, the court of appeals relied (380 F.2d at 921-922) on this Court's decisions in *United States* v. *Gilliland*, 312 U.S. 86 (1941), and *United States* v. *Bramblett*, 348 U.S. 503 (1955), which established a generally expansive and nonrestrictive construction of Section 1001. The *Adler* court also found (380 F.2d at 922) "the *Friedman* majority's restrictive interpretation of the word 'jurisdiction' as used in § 1001 * * * [ir]reconcil[able] with the broad interpretation applied to other terms in the statute." The court of appeals remarked (*ibid.*) that the only area in which the courts had demonstrated any reluctance to apply Section 1001 to criminal investigations was "the so-called 'exculpatory no' cases," in which the alleged violation of Section 1001 arises out of the defendant's negative response to a law enforcement officer's inquiry into his involvement in a crime. Yet, the court noted (*id.* at 922), even the "exculpatory no" cases had not uniformly been excepted from Section 1001 coverage.[1] In any event, the

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[1] Compare *United States* v. *Chevoor*, 526 F.2d 178, 182-184 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976) (Section 1001 inapplicable to "exculpatory no" situation); *United States* v. *Bush*, 503 F.2d 813, 818-819 (5th Cir. 1974) (same); *Paternostro* v. *United States*, 311 F.2d 298, 305, 309 (5th Cir. 1962) (same) with *United States* v. *Goldfine*, 538 F.2d 815, 821 (9th Cir. 1976) (refusing to limit applicability of Section 1001).

court stated (*id.* at 922), the "exculpatory no" cases are "readily distinguishable" from cases, such as the one before it, that involve an "affirmative, voluntary statement deliberately intended to provoke agency action."[2] With respect to the latter category of cases, the court of appeals concluded (*ibid.*):

> The making of intentionally false statements to the F.B.I. calculated to provoke an investigation by that agency may cause more "perversion" of authorized agency functions—and more harm to individuals—than false pecuniary and property claims which are clearly covered by the statute. There is nothing to suggest, either in legislative history or in the cases, that Congress in enacting § 1001 intended to conserve the energies of only certain agencies. Accordingly, a technical construction of the word "jurisdiction" which would exclude from the scope of § 1001 all matters strictly criminal in nature, is rejected, and we agree with the views of [the dissenting judge] * * * in *Friedman*, that individuals, acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F.B.I. Insofar as the penalty for a violation of § 1001 may exceed the penalty for perjury, the Supreme Court stated in [*United States* v. *Gilliland*, 312 U.S. at 95,] that "the matter of penalties lay within the discretion of Congress."

In *United States* v. *Lambert*, 501 F.2d 943, 945-946 (1974), the en banc Fifth Circuit expressly stated its preference for the Second Circuit's approach in *Adler*

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[2] As in *Adler*, the "exculpatory no" issue also is not presented and need not be reached here.

over the Eighth Circuit's in *Friedman*.[3] The court of appeals acknowledged the applicability of 18 U.S.C. 1001 to the defendant's volunteered, written statement, in which he falsely claimed that local police officers had physically mistreated him and violated his civil rights by arresting him for no reason, which statement "was intended to, and did, trigger an FBI investigation into the incident." 501 F.2d at 945. In the court's view (*id.* at 946), the defendant's statement carried a substantial potential for perverting a central function of the FBI: "Statements such as that given by appellant and falsely pointing to possible criminal conduct that is within the power of the FBI to investigate carry a substantial potential for wasting the Bureau's time and thus perverting its central function." Noting (*ibid.*) that "[p]erversion of a governmental body's function is the hallmark of a § 1001 offense," the court concluded (*ibid.*; footnote omitted) that the defendant's statement was "a 'matter within [FBI] jurisdiction' under § 1001." See also *United States* v. *Massey*, 550 F.2d 300, 305 (5th Cir. 1977).

In view of the Eighth Circuit's staunch adherence in this case to its holding in *Friedman*, notwithstanding its express acknowledgment (App., *infra*, 3a) that two other courts of appeals have rejected the *Friedman* analysis, there is a clear conflict among the courts of appeals concerning the meaning of the phrase "matter within the jurisdiction of any department or agency of

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[3] A panel of the Fifth Circuit initially had reversed the conviction in *Lambert*, adopting the reasoning of *Friedman* v. *United States*, *supra*. On the court of appeals' own motion, it granted rehearing and vacated the opinion of the panel. The court nevertheless reversed the conviction on the alternative ground that there was a fatal variance between the indictment and the proof. 501 F.2d at 946.

the United States," as used in 18 U.S.C. 1001. We therefore believe that this Court's review is now warranted.[4]

2. We further submit that the Second and Fifth Circuits were correct in concluding that Section 1001 applies to intentionally false statements volunteered to law enforcement agencies. Although this Court has not yet had occasion to reach the precise question presented by this case, our reading of the statute is strongly supported by decisions liberally construing the same phrase from Section 1001 that is at issue here. See generally Note, *Fairness in Criminal Investigations Under the False Statement Statute*, 77 Colum. L. Rev. 316, 318 (1977).

In *United States* v. *Gilliland*, 312 U.S. 86 (1941), the Court rejected the contention that, notwithstanding the substitution in 1934 of the phrase "in any matter within the jurisdiction of any department or agency of the United States" for the phrase "for the purpose and with the intent of *** defrauding the Government of the United States," (40 Stat. 1015), the statute should con-

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[4] In our brief in opposition to the petition for a writ of certiorari in *United States* v. *Adler*, *supra*, we argued (Br. in Opp. at 9 (No. 649, 1967 Term)) that *Adler* and *Friedman* were "not necessarily in conflict." As noted above (page 4, *supra*), the false statement in *Friedman* consisted of the defendant's complaint that a state police officer had mistreated him. In reversing the conviction in *Friedman*, the Eighth Circuit found (374 F.2d at 365) it "noteworthy" that the police officer "admitted that he had scuffled with Friedman while he was in custody * * *; and that Friedman admittedly had some small, observable injuries." Accordingly, we argued in the *Adler* opposition (at 9) that "the [*Friedman*] court considered the case as one where the defendant had made an exaggerated complaint rather than a totally baseless one," whereas *Adler* involved "a totally baseless charge." That distinction has been eliminated by the Eighth Circuit's adherence to *Friedman* in this case, which involves a "totally baseless" statement. See also App., *infra*, 6a n.1.

tinue to be restricted to cases involving pecuniary or property loss to the government. Rather, the Court explained (312 U.S. at 93), the purpose of the statute is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction."

It would be at odds with this statutory purpose to construe the term "jurisdiction" as referring only to rule-making or adjudicative power rather than to authority or power in general. Furthermore, the "within the jurisdiction" phrase was not meant to distinguish between different types of agencies or different official functions of a particular agency, but was intended only to differentiate between matters outside of or peripheral to the business of the department or agency involved and matters constituting the official, authorized functions of that body. As this Court noted in *Gilliland*, 312 U.S. at 93, it is the perversion and disruption of these "authorized functions" with which the statute is concerned. Here, the false charges made by respondent predictably set into motion the official, authorized investigative functions of the FBI and the Secret Service, causing the time and energies of several agents and other employees to be diverted from other, bona fide investigations to aid in the search for respondent's estranged wife. In short, respondent, for his own purposes, willfully perverted the agencies' authorized function of investigating alleged criminality.

The phrase "within the jurisdiction of any department or agency of the United States" also was construed broadly in *United States* v. *Bramblett*, 348 U.S. 503 (1955). In that case the Court upheld the conviction under Section 1001 of a former member of Congress for having falsely represented to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his official clerk. The Court

rejected the defendant's contention that only an executive agency could constitute a department or agency of the United States within the meaning of 18 U.S.C. 1001. In so holding, the Court observed (348 U.S. at 507-508; footnotes omitted):

> There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted. There was certainly no suggestion that the new phrase ["in any matter within the jurisdiction of any department or agency of the United States"] was to be interpreted so that only falsifications made to executive agencies would be reached. Apparently the *** phrase was inserted simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached.

The Court most recently construed the word "jurisdiction," as used in Section 1001, in *Bryson* v. *United States*, 396 U.S. 64 (1969). The petitioner in *Bryson* had been convicted under 18 U.S.C. 1001 for filing an affidavit, required by then existing Section 9(h) of the National Labor Relations Act, 29 U.S.C. (1958 ed.) 159(h), in which he falsely denied affiliation with the Communist Party. *Bryson* involved a collateral attack on that conviction on the basis of the alleged unconstitutionality of Section 9(h).

This Court affirmed the denial of collateral relief, holding (396 U.S. at 68-69) that the constitutionality of Section 9(h) was irrelevant to the validity of Bryson's conviction since "none of the elements of proof necessary for [Bryson's] conviction under § 1001 has been shown to depend on the validity of § 9(h)." Of particular relevance to the present case is the Court's rejection of Bryson's contention (396 U.S. at 70) "that if § 9(h) was unconstitutional, then the affidavit requirement was not within the 'jurisdiction' of the Board, and therefore the false statement was not punishable under

§ 1001." Relying on its prior decisions in *Bramblett* and *Gilliland* for the proposition (396 U.S. at 70) that "there is a valid legislative interest in protecting the integrity of official inquiries," the Court concluded (*ibid.*) that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001."

The court below attempted to distinguish *Bryson* on the ground (App., *infra*, 4a) that "[t]he NLRB is an agency with the power to adjudicate rights and establish regulations" and, therefore, "under the *Friedman* rationale, would be distinguishable from agencies such as the FBI and Secret Service." In fact, however, neither the adjudicative nor the regulatory aspect of the NLRB's jurisdiction was necessarily involved in *Bryson*. Rather, the affidavit described in Section 9(h) was a prerequisite to the exercise of even the Board's investigatory and prosecutorial powers—*i.e.*, "to the making of an investigation by the Board and the issuance of any complaint for the benefit of the union in question" (*Leedom* v. *International Union of Mine Workers*, 352 U.S. 145, 148 (1956))[5]—precisely the type of "jurisdiction" that is exercised by the Department of Justice, the FBI and the Secret Service. Moreover, in holding (396 U.S. at 70) that the term "jurisdiction" "should not be given a narrow or technical meaning for purposes of § 1001," the Court relied directly (*id.* at 71) on the Second Circuit's decision in *United States* v. *Adler*, *supra*. Hence, although the Court in *Bryson* did not focus specifically on the type of

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[5] 29 U.S.C. (1958 ed.) 159(h) provided in relevant part (emphasis added):

> No *investigation* shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no *complaint* shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit * * *.

agency or the nature of the administrative function to which Section 1001 is applicable,[6] the Court's ready application of the statute to the facts of that case strongly suggests that the Eighth Circuit's highly technical distinction between types of jurisdiction will not withstand scrutiny.

Finally, as noted above (pages 4-5, *supra*), the *Friedman* court relied heavily (374 F.2d at 366) on the legislative history of Section 1001, in particular on the motivation for the addition of the language at issue here,[7] for its restrictive interpretation of the term "jurisdiction." But this Court has repeatedly examined the same legislative history and has found no basis for avoiding a literal application of this broadly worded statute. See *United States* v. *Bramblett*, 348 U.S. at 507-508; *United States* v. *Gilliland*, 312 U.S. at 93-95. Nor have we found anything in the scant history of the language at issue here that lends any support to the narrow construction the Eighth Circuit has placed on the statute.

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[6] The court noted in *Bryson* (396 U.S. at 71 n.10): "We have no occasion in the present context either to approve or disapprove *Friedman*'s holding."

[7] The amendment containing the "matter within the jurisdiction" language was "proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith." S. Rep. 1202, 73d Cong., 2d Sess. 1 (1934); 78 Cong. Rec. 11270-11271 (1934). The Eighth Circuit erroneously concluded from this statutory origin that the only purpose of the statute was to assure the receipt of accurate information by the newly created regulatory agencies. *Friedman* v. *United States*, 374 F.2d at 366.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-2495

UNITED STATES OF AMERICA, APPELLANT,

v.

LARRY WAYNE RODGERS, APPELLEE.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: April 12, 1983

Filed: May 9, 1983

Before LAY, Chief Judge, MCMILLIAN and JOHN R. GIBSON, Circuit Judges.

LAY, Chief Judge.

Larry Wayne Rodgers was charged in a two count indictment for making "false, fictitious or fraudulent statements" to federal agencies in violation of 18 U.S.C. § 1001 (1976).[1] Rodgers allegedly made sep-

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[1] Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

arate false statements to the Federal Bureau of Investigation (FBI) and the United States Secret Service regarding his estranged wife and an assassination plot against the President of the United States. The district court, the Honorable Howard F. Sachs presiding, relied on our decision in *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967), and granted Rodgers' motion to dismiss the indictment. The government appeals from this dismissal and asks that we reexamine our holding in *Friedman*. Because we find the reasoning and analysis in *Friedman* still valid, we affirm the judgment of the district court.

Rodgers telephoned the Kansas City, Missouri, office of the FBI on June 2, 1982, and reported that his wife had been kidnapped. The FBI spent over 100 agent hours investigating this alleged kidnapping; it was subsequently determined that the wife's disappearance appeared to be a domestic problem. A few weeks later Rodgers contacted the Kansas City office of the Secret Service and reported that his "estranged girlfriend" (actually his wife) had been induced to join an assassination plot against the president. The Secret Service spent over 150 hours of agent and clerical time investigating this threat and located Rodgers' wife in Arizona. She stated that she had left the Kansas City area to get away from Rodgers. Rodgers later confessed that he made these false reports to induce the federal agencies to locate his wife.

In *Friedman* we considered a similar factual situation. The defendant had contacted the FBI and made statements that induced the FBI to investigate a potential civil rights violation. The defendant's statements proved to be false. Judge Floyd R. Gibson, writing for the majority, reversed the defendant's conviction under section 1001. Judge Gibson concluded that the investigation into a possible criminal law violation was not a matter over which the FBI exercised "jurisdiction" as

that term is used in section 1001. The court analyzed the historical context of the statute, the social policy served by an open line of communication between the general public and law enforcement agencies, and the absurd effect a literal application of the statute would have on the perjury statutes. *See* 18 U.S.C. § 1621 (1976). The court concluded in order to effectuate the intended purpose of the statute the term "jurisdiction" must be defined restrictively to include only the positive powers that reside in an agency. We observed:

> The F.B.I. had authority to investigate, and in that broad sense it had "jurisdiction." However, it had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry. In this restrictive sense, the investigation of a possible violation of the criminal law is not a matter over which the F.B.I. exercises "jurisdiction." It is in this more restrictive sense, we believe Congress intended to use the word "jurisdiction" in determining violations of § 1001.

374 F.2d at 368.

On this basis we held section 1001 had no application to a false statement given merely to induce the FBI to conduct an investigation and the indictment should have been dismissed.

The reasoning of *Friedman* still soundly applies to false statements made to the FBI. The analysis applies equally as well to statements made to the Secret Service. We are not unmindful that two other courts of appeals have found that making false statements to the FBI constitutes a violation of section 1001. *See, e.g., United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc) (10-7); *United States v. Adler*, 380 F. 2d 917, 921-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).[2] However, we are not persuaded by those deci-

[2] The government also cites *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972), as authority contrary to *Friedman*. We do not read *Bedore* to be necessarily inconsistent with the

sions that the *Friedman* case should be overruled. *Friedman* was well-reasoned and thoroughly discussed the legislative history, policies, and existing case law. The *Friedman* definition of jurisdiction has been repeatedly approved by this court. *E.g.*, *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983).

The government contends the Supreme Court's decision in *Bryson v. United States*, 396 U.S. 64 (1969), mandates a different result. We must respectfully disagree. *Bryson* concerned a false statement made in an affidavit filed with the National Labor Relations Board pursuant to its explicit statutory authority. The NLRB is an agency with the power to adjudicate rights and establish regulations, and under the *Friedman* rationale, would be distinguishable from agencies such as the FBI and Secret Service. The Court expressly stated it had "no occasion in the present context either to approve or disapprove *Friedman*'s holding." *Id.* at 71 n.10. *See also United States v. Cowden*, 677 F.2d 417, 419 n.4 (8th Cir. 1982) (declining to comment on viability of *Friedman* in light of *Bryson*).

We find the more persuasive analysis and reasoning to be in *Friedman*. Therefore, we adhere to our prior decision and affirm the judgment of the district court.

Friedman analysis. *Bedore* held only that the giving of a false name to an FBI agent when questioned was not within the class of false "statements" proscribed by section 1001. *Id.* at 1110. *Bedore* did not turn on the definition of "jurisdiction."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LARRY WAYNE RODGERS, DEFENDANT.

No. 82-00127-01-CR-W-6

ORDER

Defendant was indicted by the Grand Jury on September 2, 1982 for allegedly violating 18 U.S.C. § 1001 by making separate false statements to the Federal Bureau of Investigation and the United States Secret Service, to the effect that his wife had been kidnapped and (later) was involved in a plot to assassinate the President. Pending is defendant's motion to dismiss the indictment. The motion was referred to Chief Magistrate Hamilton, who conducted a hearing and issued a report and recommendation, dated December 8, 1982. We adopt the report and recommendation of the Magistrate and grant the motion to dismiss.

Defendant relies on *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967). In that case the Court of Appeals for the Eighth Circuit held that the investigation of a possible criminal violation is not a matter over which the F.B.I. exercises "jurisdiction" in the sense that the term is used in § 1001. 374 F.2d at 368. The Court distinguished situations in which an agency has "power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry," *id.*, and stated its concern that allowing prosecution for the making of false statements to law enforcement officials would have a

chilling effect on the providing of information by citizens to those officials. *Id.* at 369.

Defendant's alleged conduct, as charged in the indictment, falls squarely within the *Friedman* holding.[1] Other courts of appeals have declined to accept the interpretation of § 1001 followed in *Friedman*, *see, e.g.*, *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974); *United States v. Adler*, 380 F.2d 917 (2d Cir), *cert denied* 389 U.S. 1006 (1967) and the Court of Appeals for the Eighth Circuit has expressly declined to confirm the continued viability of *Friedman*. *United States v. Cowden*, 677 F.2d 417 (8th Cir. 1982). Nevertheless, this Court must conclude that *Friedman* continues to represent the state of the law in the Eighth Circuit until such time as the Court of Appeals decides to the contrary. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the indictment is GRANTED.

/s/ Howard F. Sachs

HOWARD F. SACHS
United States District Judge

DATED: December 10, 1982

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[1] One of the false statements charged was made to the Secret Service, rather than the F.B.I., but the rationale of *Friedman* would apply equally to investigations by the Secret Service. The government argues that, unlike the situation in *Friedman*, this case involves complaints not conceivably founded on any facts and contends that *Friedman* may be distinguished on this basis. While the factual circumstances of this case may be more egregious in terms of both the basis for and the seriousness of the complaints, the opinion in *Friedman* gives no indication that these factors should be balanced against the factors discussed by the court therein.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1982

No. 82-2495-WM

JUDGMENT

UNITED STATES OF AMERICA, APPELLANT,

v.

LARRY WAYNE RODGERS, APPELLEE.

Appeal from the United States District Court for the Western District of Missouri.

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the order of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

May 9, 1983

Order entered in accordance with opinion

/s/ Robert D. St. Vrain

Clerk,
U.S. Court of Appeals, 8th Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2495. September Term, 1982

UNITED STATES OF AMERICA, APPELLANT,

v.

LARRY WAYNE RODGERS, APPELLEE.

Appeal from the United States
District Court for the
Western District of Missouri.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross and Fagg would grant the petition for rehearing en banc.

July 25, 1983

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